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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	CS Docket No. 98-201
to Unserved Households for	)	RM No. 9335
Purposes of the Satellite Home	)	RM No. 9345
Viewer Act	)	
	)	
Part 73 Definition and Measurement	)	
of Signals of Grade B Intensity	)	

To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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Summary

Localism is the bedrock principle on which the system of free over-the-air television -- a system that has served this country well for half a century -- has been built. As Congress and the Commission have consistently recognized, an essential economic basis of localism is the network/affiliate system, through which local stations deliver network programming to local viewers, and local stations are protected from invasion of their markets by the same network programming brought in from distant markets.

Localism and the continued viability of the network affiliate system are today at risk. Until recently, those principles were most seriously threatened by the widespread and flagrant infringement of affiliates' rights under the Copyright Act by satellite carriers such as PrimeTime 24 and EchoStar. To the threat posed by satellite industry lawlessness must now be added the threat created by proposals under consideration in this proceeding -- proposals advanced by the very scofflaws who created the peril to localism and free, over-the-air broadcasting in the first place.

Both the language of the SHVA and its legislative history establish that Congress intended to create (as the Commission acknowledges) a "narrow" and "limited" compulsory license, which would apply to only a tiny percentage of American TV homes, would be limited almost exclusively to rural areas, and would do no harm to localism and the network/affiliate relationship. The proposals advanced by the lawbreakers in the satellite industry utterly contradict each of these principles.

The proposal having the potentially most devastating impact on localism and the network affiliate system is the suggestion that the Commission modify the definition of a "Grade B intensity signal" -- not for all purposes, but simply to hand over more local viewers to satellite companies under SHVA. Signal intensity is the DNA that controls the central issue under the SHVA -- whether a copyright owner's normal exclusive rights under the Copyright Act will be respected or whether a third party may usurp them. The Commission has no authority whatsoever to change the central genetic code of the SHVA; the Commission has no valid basis, grounded in sound engineering practices to change it; and the Commission could not possibly justify changing it in this proceeding given its 50 year reliance on the identical definition of "Grade B intensity" and its use, only a few months ago, of that same definition as the foundation of its channel allocation for digital television. Any significant increase in the definition of Grade B intensity would have disastrous consequences for many affiliates, placing at risk as much as seventy percent of their audience for some stations.

The other set of proposals in this proceeding placing localism at the greatest peril are those that would jury-rig the methods for testing signal intensity. The Commission has a sound and longstanding set of procedures for measuring signal strength intensity that it should maintain, subject only to possible minor adjustments to try to make the measurements cheaper and easier to perform. The Commission must reject the satellite industry's proposals designed to subvert the testing process, such as use of defective equipment, orienting antennas improperly, or dividing a signal several times before measuring it. These proposals violate both sound engineering principles and the plain language of the SHVA.

The SHVA expressly places the burden of proof on satellite carriers to establish that a household is unserved, and the courts have already concluded that carriers can meet that burden only by conducting actual site measurements. Accordingly, any method for predicting Grade B intensity the Commission may choose to adopt would merely serve as a recommendation that courts might use as part of an equitable remedy to insure compliance with the SHVA. To the extent the Commission chooses to adopt a suggested prediction methodology, it should endorse the same Longley-Rice model relied on in the digital allocation proceeding. It should not adopt any methodology that would underpredict station coverage areas, resulting in massive numbers of subscribers being sold distant network affiliate signals from which they would be later disconnected.

While the Commission may wish to encourage competition to cable, copyright in general, and the SHVA in particular, is not the legal or appropriate means to achieve that goal. There are critical differences between cable and satellite -- the former clearly being authorized to carry local signals while the latter is forbidden from doing so. While it may be desirable to authorize satellite to deliver local stations into their local markets -- indeed, NAB urges the FCC to endorse such a proposal -- that is a decision for Congress, not the FCC. In the meantime, the Commission need shed no tears for the satellite industry. The industry is finding lawful ways to provide network stations, and DirecTV has broken all past sales records since being ordered in July to begin complying with the SHVA.

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COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Introduction

This proceeding has nothing to do with the ability of satellite companies such as DirecTV and EchoStar to sell dishes or to provide any of the hundreds of nonbroadcast channels, such as CNN, ESPN, and Nickelodeon, that they purchase through the marketplace. This proceeding concerns only the sale of network stations by satellite, which is governed by a strict compulsory license in the Copyright Act that -- in order to protect localism -- is limited to a narrowly defined class of "unserved households."

For many years, satellite companies such as PrimeTime 24 have had a simple, and utterly cynical, strategy: (1) sign up as many illegal subscribers for distant network stations as possible, (2) when the courts inevitably order the satellite companies to stop breaking the law,

enlist terminated subscribers as a lobbying army to try to ratify the satellite companies' lawbreaking.

The Commission should **not** lend its prestige and administrative clout to this contemptible strategy -- even if it had the legal authority to do so, which it emphatically does not. Having deliberately broken the law for years, the satellite industry now asks the Commission to put free, over-the-air television in jeopardy for all 100 million television households nationwide, in order to prevent a few hundred thousand illegally signed up subscribers from having their service terminated. It would be terrible public policy to "solve" a small problem created by satellite industry lawlessness by sabotaging -- on a national basis -- the free, local, over-the-air television system that has long served the American public well.

The Commission completely lacks jurisdiction to undertake such a radical step. Congress extended no power whatsoever to the FCC to tamper with the central compromise embodied in the Satellite Home Viewer Act -- the decision to create a narrow compulsory license limited to a small number of rural households. And if the Commission had any authority at all in this area, it could not use that authority to take any steps that would jeopardize localism and the network/affiliate relationship.

Notably, the subscribers who are required to be terminated by the preliminary injunction issued by the Miami federal court live in locations that the Commission, using sophisticated, terrain-adjusted propagation software, has determined to be *served* by their local stations in the DTV proceeding. Yet the satellite industry would have the Commission contradict

itself -- and ignore the laws of physics -- and deem many of these locations to be unserved, thereby opening them up to unfettered invasion of distant network stations delivered by lawbreakers.

The real reasons so many dish owners have signed up for illegal satellite service have nothing to do with being "unserved households." It is not that these viewers had no network service before they signed up for satellite-delivered network stations: Nielsen data for many years have shown that more than 99% of all TV households are able to view programming from the television networks.[1/] And with rare exceptions, a household's decision to subscribe to a satellite service has *nothing to do with any problem about the strength of the local station's signal.* Rather, as discussed in detail below, ineligible households sign up for satellite service in order to time-shift, to obtain sports or other programs not broadcast by their local stations, or simply to avoid the need to use an over-the-air antenna.

Two federal courts have already found that the satellite industry has knowingly broken the law by signing up illegal subscribers for these and other reasons. ABC, Inc. v. PrimeTime 24 Joint Venture, 17 F. Supp.2d 467 (M.D.N.C. 1998); CBS Inc. v. PrimeTime 24 Joint Venture, 9 F. Supp.2d 1333 (S.D. Fla. 1998). Yet to judge from the Commission's public comments when the NPRM was released, the FCC is considering drastic changes to its regulations that would turn over a large portion of these illegal subscribers to the lawbreakers, and strip away all rights from the local stations that seek to serve them. For example, one

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1/ Testimony of Preston Farr, 6/2/97 Hearing Tr. 65, CBS Inc. v. PrimeTime 24.

Commissioner has been quoted as saying that of the one million households expected to have their satellite-delivered CBS and Fox service terminated in February 1999, "at least 150,000 to 200,000" would be permitted to continue to receive the service based on changes by the FCC.[2/] Another FCC official is quoted as saying that "about 15 to 20 percent of those facing a cut-off would likely get a reprieve once the FCC decides how to revise the definition by early next year."[3/] The viewers who would get this unlawful "reprieve" would be on top of the viewers that the Court is permitting the satellite companies to continue to serve (absent a contrary signal measurement) because they are predicted to be unserved by the standard terrain-adjusted Longley-Rice prediction method that the Commission used in determining station coverage areas in the DTV proceeding. The Commission interviews describe plans for these enormous cutbacks in station protected service areas even though the most recent congressional proposals would have reduced station coverage areas by only **3%.**

If the Commission were actually to take such a radical step, the impact on localism -- and the network/affiliate system that is the backbone of localism -- would be devastating. The Commission needs to appreciate that whatever steps it takes to try to "rescue" some additional number of illegal subscribers will be magnified more than 100-fold when the same regulatory principles are applied to the nation's 100 million television homes.

2/ FCC Eyes Satellite Programming, Associated Press (Nov. 17, 1998).

3/ FCC sees little room to help satellite TV viewers, Reuters (Nov. 18, 1998).

So multiplied, as they necessarily would be -- since the Commission has no authority to create some special regime to grandfather illegal subscribers -- the effect of the regulatory changes described in the Commission interviews would be to **strip away from local network stations all protection with respect to 15% or 20% of all American TV households. These 15 to 20 million households, with 40 to 53 million viewers,** would be given as an astronomically generous gift to deliberate copyright infringers such as PrimeTime 24 -- **even though the Commission found just months ago that all of these households are in fact presumed to be served by those same stations.** These 40 to 53 million people would be in addition to the households that satellite carriers would be able to serve because Congress actually intended them to be eligible.

Perhaps as a way of achieving that result, the NPRM suggests that the Commission might take the extraordinary step of increasing "Grade B intensity" dBu levels -- just for SHVA, not for any other regulatory purpose -- to nearly Grade A levels. NPRM, ¶ 28. The Commission has no authority whatsoever to take such a step, and none of the petitioners has asked the Commission to do so. Even if the FCC had the relevant authority, it would be a mistake of historic dimensions to take that radical step, which would inflict a tremendous blow on free, over-the-air television, particularly in small markets. Consider the following examples (supported by maps reprinted in Appendix A):

- KAAL, an ABC station licensed to Austin, Minnesota, would lose some **65%** of the population that the FCC recognized as served by KAAL in the

DTV proceeding. Among the many local communities lost to KAAL would be Rochester, Mankato, and Fairbault.

- WSAZ, an NBC station licensed to Charleston-Huntington, West Virginia, would wake up to discover that some **47%** of the population the Commission acknowledged WSAZ to serve in the DTV proceeding would be considered "unserved households." WSAZ would be stripped of any rights in much of its core coverage area, which would be handed over to scofflaws such as PrimeTime 24.

- KTVO, an ABC station in Ottumwa, Iowa-Kirksville, Missouri, would lose all protection as to **71%** of the households that it today serves in its local communities.

- WLOS, an ABC station licensed to Asheville, North Carolina but also serving Greenville, North Carolina and Spartanburg, South Carolina would lose **45%** of its local served population.

- KHQA, a CBS station licensed to Quincy, Illinois, would lose all protection as to **40%** of its served population. KHQA would be stripped of protection in major communities within its service area, including much of Fort Madison and Macomb, which would be turned over to willful and repeated infringers such as PrimeTime 24.

- KXJB, a CBS station licensed to Fargo-Valley City, North Dakota, would lose all rights with respect to 44% of its served population. KHQA would forfeit most or all of its protection in key local communities such as Grand Forks.

We discuss many similar examples below.

The Commission has already recognized that it lacks the authority to prevent most of PrimeTime 24's illegal subscribers from having their unlawful service terminated. NPRM, ¶ 15. It is certain that some of these subscribers -- who have been lied to by the satellite industry and have become accustomed to an unlawful service -- will vocally protest. Even if the Commission were to take the revolutionary steps described above with the devastating consequences just described, it could not prevent the transition problems that will inevitably occur when the satellite industry is finally required to obey the law. The Commission should use its authority to help solve those transition problems, not to reward the lawbreakers who created the problem in the first place.

I. THE SATELLITE HOME VIEWER ACT

A. The Purpose of the "Unserved Household" Restriction

In the 1980s, satellites emerged as a new method of retransmitting broadcast stations to viewers. As with cable (and later with open video systems), Congress immediately recognized that satellite retransmission, if not narrowly limited, could destroy the network/affiliate system that Congress and the Commission have consistently sought to preserve as a way to promote localism. Indeed, as the Copyright Office has emphasized, in a report relied on by the Commission in the NPRM, "importation of distant network signals creates a *greater* potential for harm for broadcasters and copyright owners in the satellite context than it does in the cable context."[4/]

Accordingly, in the Satellite Home Viewer Act ("SHVA") (creating Section 119 of the Copyright Act), Congress crafted a special compulsory license for the satellite carrier industry, but strictly limited the license so that only viewers who could not receive their local stations over the air (so-called "unserved households") -- and no one else -- would be eligible to receive network stations by satellite. See 17 U.S.C. § 119(d)(10); Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship") (emphasis added).

4/ Report of the Register of Copyrights, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals 119 (Aug. 1, 1997) (hereinafter "Copyright Office Report") (emphasis added).

The special compulsory license in Section 119 of the Copyright Act gives satellite carriers a remarkable privilege: it allows them, without obtaining anyone's consent, to retransmit and sell to dish owners costly, copyrighted television programming created or purchased by the ABC, CBS, Fox, and NBC networks and their affiliates. Although broadcasters must compete in the marketplace for the right to pay vast sums for this programming -- witness the recent bidding wars for "ER" and NFL Football -- satellite companies can simply *take* the programming, at a government-set rate, and sell it at prices that generate huge profits. Congress' decision to limit that extraordinary transfer of property rights by restricting delivery to "unserved households" was intended to ensure that the compulsory license would not jeopardize localism and the network/affiliate system by allowing satellite companies to duplicate the network programs offered by local network stations.

To accomplish that purpose, Congress adopted a simple, objective test for determining eligibility under the SHVA. Congress knew that if it established a vague or debatable standard for "unserved households," enforcement of the law would be impossible. Congress therefore chose a strictly objective definition of which households qualify as "unserved."

The definition of "unserved household" has two prongs, the first of which -- relating to "Grade B intensity" -- is the focus of the Commission's NPRM.[5/] That prong limits

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[5/] The second portion of the definition of "unserved household" requires that the customer not have obtained network programming by cable within 90 days before signing up for satellite delivery of network programming. 17 U.S.C. § 119(d)(10). Congress imposed this restriction to discourage subscribers from switching from local to distant network stations. See H.R. Rep. No.

delivery of network programming by satellite to households that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10).

As the NPRM expressly recognizes, Congress' decision to adopt a specific and narrow compulsory license was crucial to its objective of protecting localism:

> We acknowledge and reiterate Congress' decision in the SHVA to protect network-affiliate relationships and to foster localism in broadcasting. If we change the number of viewers predicted to receive a local station, we may substantially affect these policies. As we have noted, localism is central to our policies governing broadcasting and the obligation of broadcasters to serve the public interest.
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> NPRM, ¶ 36.

B. The Satellite Home Viewer Act is Part of the *Copyright Act*

The Satellite Home Viewer Act is part of the Copyright Act, not part of the Communications Act. That fact is profoundly significant, for several reasons.

Under the Copyright Act, copyright owners generally enjoy the exclusive right to exploit their works, and to authorize (or decline to authorize) others to do so. 17 U.S.C. § 106.

100-887, pt. 1, at 27 (1988).

The Satellite Home Viewer Act creates a narrow exception to that principle: it authorizes satellite carriers to deliver network stations (such as ABC, CBS, Fox, and NBC stations) to dish owners, but only those in "unserved households." As discussed below, because the SHVA compulsory license permits third parties to exploit and profit from copyrighted works they have not created or bargained for, it must necessarily -- like all compulsory licenses -- be narrowly construed.

The fact that the SHVA is part of the Copyright Act is critical for a second reason: the courts, not the FCC, enforce and interpret the Copyright Act. For example, as the NPRM recognizes, it is up to the courts, not to the Commission, to decide what type of evidence will satisfy the burden of proof that Congress expressly placed on satellite carriers in copyright infringement suits. See NPRM ¶ 24 ("a predictive process *might* be a judicially acceptable means for a satellite service provider to carry its burden [of proof]") (citing 17 U.S.C. § 119(a)(5)(D)) (emphasis added).

Finally, SHVA's status as part of the Copyright Act is significant because the Commission has never been granted authority to modify the provisions of that Act -- much less

to transform a stringently narrow compulsory license enacted by Congress into a vast transfer of intellectual property rights from copyright owners to copyright infringers.

II. CONGRESS INTENDED AND UNDERSTOOD THAT THE SATELLITE COMPULSORY LICENSE WOULD APPLY ONLY TO A TINY FRACTION OF THE NATION'S HOUSEHOLDS AND WOULD NOT HARM LOCALISM AND THE NETWORK/AFFILIATE SYSTEM

As the Commission has expressly recognized in the NPRM, the SHVA is a ***"limited"*** and ***"narrow"*** compulsory license. NPRM, ¶ 2 (emphasis added). In enacting the SHVA, Congress sought to authorize satellite delivery of network programming to the minuscule number of households that are genuinely "unserved" by local network affiliates, *while also ensuring that other households did not receive duplicative network programming by satellite.* See Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship") (emphasis added).

In particular, when Congress crafted a compulsory license for satellite carriers in 1988, it took pains to ensure that the new compulsory license would not interfere with localism and free, over-the-air broadcasting. To achieve that result, Congress carefully limited delivery of network affiliates to "unserved households." That is, Congress prohibited satellite carriers from delivering network affiliates to any household that either is capable of receiving a signal of Grade B intensity (as defined by the FCC) of a local network affiliate, or that has subscribed within the

previous 90 days to a cable system. See 17 U.S.C. § 119(d)(10) (definition of "unserved household").

In deciding how to craft the SHVA license, Congress considered -- and rejected -- a test advocated by the satellite industry based on subjective, self-reporting about "picture quality." See CBS Inc. v. PrimeTime 24, 9 F. Supp.2d at 1344; ABC, Inc. v. PrimeTime 24, 17 F. Supp.2d at 476. Instead, Congress looked for a bright-line, objective proxy for acceptable picture quality, and chose the Grade B signal strengths that the Commission had promulgated for 30 years as such a proxy. Id.; see Engineering Report of Jules Cohen. Congress made this choice because the broad compulsory license advocated by the satellite industry would have harmed localism and the network/affiliate relationship. See Declaration of Michael J. Remington, Former Counsel to the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Administration of Justice, reprinted in Copyright Office Report, Appendix II, at 496-97 (1987) (prior satellite industry proposal was rejected by Congress because it would have done "significant harm to the existing network/affiliate distribution relationship by permitting the reception of duplicative network signals"); id. at 9 ("[w]ithout the objective standard and protection of the network/affiliate relationship, the 1988 SHVA would not have been enacted") (emphasis added).

As discussed below, Congress understood that this "limited" and "narrow" compulsory license would apply to only an extremely small number of households; that it would apply almost entirely in rural, and not in urban or suburban areas; and that it would not harm local network stations.

A. Congress Understood and Intended That Only a Minute Fraction of All U.S. Television Households Would Qualify for Satellite Network Delivery

In enacting the SHVA, Congress believed that only a tiny fraction of American television households would qualify as "unserved households":

- At congressional hearings in 1988, one of the largest satellite carriers testified that "we all agree that **approximately 1 percent or approximately 1 million** is the figure" for white area households.[6/]
- The House Judiciary Committee Report on SHVA states that only a **"small percentage"** of television households would be eligible to receive network programming by satellite.[7/]
- The Register of Copyrights testified that only "**a relatively small number** of viewers would qualify under the act for satellite delivery of broadcast network programming."[8/]
- The Commission itself -- in a report *specifically relied on by Congress in enacting the SHVA in 1988* -- concluded that only **no more than a million** households are unable to receive local network affiliates.[9/]

6/ Satellite Home Viewer Copyright Act: Hearings on H.R. 2848 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice, 100th Cong. 289 (1988) (Testimony of Brian J. McCauley, President, Netlink USA) (emphasis added).

7/ H.R. Rep. No. 100-887, pt. 1, at 18 (1988) (emphasis added).

8/ Hearing Before the Subcomm. On Courts, Civil Liberties and the Administration of Justice, House Comm. on the Judiciary, 100th Cong. (Jan. 27, 1988) (statement of Ralph Oman) (emphasis added).

9/ H.R. Rep. No. 100-887, pt. 1, at 19-20 & n.31 (citing FCC Scrambling Report (Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, 2 F.C.C.Rcd. 1669, 1688-98 (1987)); see Scrambling Report, 2

B. Congress Created the Satellite Compulsory License For *Rural*, Not Urban or Suburban, Viewers

Congress' goal in enacting the satellite compulsory license was solely to authorize satellite delivery of network programming to a small number of viewers located almost entirely in rural areas. See Declaration of Michael J. Remington, reprinted in Copyright Office Report, Appendix II, at 489-94 ("the 1988 SHVA was enacted to benefit satellite home viewers who reside in rural (and not urban and suburban) parts of the country") (emphasis in original); 134 Cong. Rec. 28582 (1988) ("The goal of the bill . . . is to place rural households on a more or less equal footing with their urban counterparts.") (remarks of Rep. Kastenmeier) (emphasis added); 134 Cong. Rec. 28585 (1988) ("This legislation will increase television viewing choices for many rural Americans") (remarks of Rep. Slattery) (emphasis added); 134 Cong. Rec. at 28587 (1988) ("television programming in rural areas is often limited") (remarks of Rep.. Roth) (emphasis added); Transcript of House Judiciary Committee hearing (Aug. 2, 1988) ("[T]his agreement . . . advances the public interest by ensuring the availability of network signals throughout rural America.") (remarks of Rep. Boucher) (emphasis added).

F.C.C. Rcd. at 1697, ¶ 198 ("With respect to the extent of the 'white area', the problem is not substantial upon a nationwide basis, consisting of fewer than a half million households and we have concluded that no action is warranted at this time."); see also Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, Gen. Docket 86-336, Second Report and Order, 3 FCC Rcd. No. 5 1202, 1209 ¶ 164 (released Mar. 11, 1988) ("the consensus appears to be that 800,000 to 1 million households are in these areas. This is roughly equivalent to one percent of television households."); id. at n.41 ("The following estimates of white areas are available: 1) NBC--800,000 households; 2) ABC--861,000 households; 3) CBS-- 400,000-1,400,000 households; 4) SBN--1 million households; 5) Netlink--a maximum of 1 million households . . .").

Members of Congress expressed the same understanding in extending Section 119 in 1994. See Cong. Rec. S5406-07 (daily ed. May 10, 1994) (statement of Sen. Heflin) (urging "expeditious consideration" of 1994 amendments; "it would be unconscionable to leave our rural citizens worrying about whether they would have access to broadcast and cable programming next year") (emphasis added); Cong. Rec. S6156 (daily ed. May 23, 1994) (statement of Sen. Leahy) ("I thank my colleagues for their interest in ensuring that our constituents in rural areas have this opportunity to participate by satellite in the widest possible array of news, sports, entertainment, educational, and informational programming") (emphasis added); Cong. Rec. H8419 (daily ed. Aug. 16, 1994) (statement of Rep. Hughes) ("[i]n most cases, there are no cable systems to compete with. Most rural Americans have a single source -- the satellite carrier . . . .") (emphasis added).

C. Congress Intended and Understood that the Satellite Compulsory License Would Not Jeopardize Localism or the Network/Affiliate Relationship

The Congress that enacted the Satellite Home Viewer Act in 1988 -- and the Congress that extended the Act in 1994 -- would have been astounded at the suggestion that the narrow satellite compulsory license they were enacting might be twisted by the FCC into an expansive license covering tens of millions of urban and suburban households. In enacting the SHVA, Congress indicated in every possible way, both in the language of the Act and in controlling legislative history, that it did not intend any such assault on localism, free, over-the-air broadcasting, and the network/affiliate system.

First, Congress explained repeatedly that it considered protection of local network stations to be vitally important. See, e.g., Copyright Office Report at 104 ("The legislative history of the 1988 Satellite Home Viewer Act is *replete with Congressional endorsements of the network-affiliate relationship and the need for nonduplication protection.*") (emphasis added); Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas *while preserving the exclusivity that is an integral part of today's network-affiliate relationship*") (emphasis added); id. at 26 ("The Committee is concerned that changes in technology, and accompanying changes in law and regulation, *do not undermine the base of free local television service upon which the American people continue to rely*") (emphasis added); H.R. Rep. No. 100-887, pt. 1, at 20 (1988) ("Moreover, the bill *respects the network/affiliate relationship and promotes localism.*") (emphasis added). The Commission's NPRM expressly recognizes this crucial point: "**We acknowledge and reiterate Congress' decision in the SHVA to protect network-affiliate relationships and to foster localism in broadcasting**." NPRM, ¶ 36 (emphasis added).

Second, Congress considered it so important to keep stations and their local viewers linked that even viewers who cannot receive a Grade B intensity signal are ineligible for satellite delivery if they have recently subscribed to cable. 17 U.S.C. § 119(d)(10)(B). The reason is that cable, unlike satellite, almost always provides local, and not distant, network stations -- and thereby protects localism and the network/affiliate relationship.

Third, Congress considered protection of localism and the network/affiliate relationship so vital that in crafting penalties for violation of that restriction, it required courts to put a satellite carrier out of the business of retransmitting network signals in the area if the court found that the carrier had engaged in a pattern or practice of violating the "unserved household" limitation. See 17 U.S.C. § 119(a)(5)(B) (1998); ABC, Inc. v. PrimeTime 24, 17 F. Supp.2d at 489.

Finally, when Congress extended the SHVA in 1994, it was so concerned about abuse of the compulsory license by satellite carriers that it expressly required them -- not broadcasters -- to bear the burden of proof about whether each customer is capable of receiving signals of Grade B intensity from local stations. See 17 U.S.C. § 119(a)(5)(D).

D. Congress' Choice of "Grade B Intensity" Can Be Understood Only Against This Backdrop of Concern to Create A Narrow Compulsory License that Would Respect Localism

It is only in this context -- Congress' search for a narrow, objective test that would identify a small number of rural households -- that Congress' decision to borrow "Grade B intensity" from the Commission's long-standing regulation can be understood. When Congress made that choice, it was a well-known matter of public record that the FCC had for decades relied on Grade B signal strengths as an objective proxy for signal quality, see Engineering Report of Jules Cohen, ¶¶ 2-8, and that the FCC used that objective proxy for a wide variety of regulatory purposes. There is nothing whatsoever in the text or legislative history of the Act to suggest that Congress -- which did not expressly delegate any authority whatsoever to the

Commission on the matter -- intended to permit the FCC to create a special definition of Grade B intensity different from the definition that the Commission uses for all other regulatory purposes. To the contrary, Congress plainly did not intend to delegate to the Commission the power to alter the fundamental compromise embodied in the Act.

E. Several of the Changes Discussed in the NPRM Would Be Totally Inconsistent With Congress' Intent to Create a Narrow Compulsory License That Protects Localism And the Network/Affiliate Relationship

The NPRM discusses (without, of course, endorsing) several potential regulatory actions that -- if the FCC had jurisdiction to act on them, which it does not -- would violate Congress' mandate in every possible way: they would create a broad, not a narrow, compulsory license; the license would be widely available in urban and suburban, not just rural, areas; and it would have a crushing effect on localism and the network/affiliate relationship. Those actions include:

- increasing the dBu levels that count as "Grade B" -- not for all purposes, but solely to make more households eligible under the SHVA to receive network signals by satellite (NPRM, ¶ 28);

- changing the method for predicting which locations are likely to receive a Grade B signal from the established method used by the Commission in the DTV proceeding to a radical new method that would use unprecedented inputs (such as the "99/99" parameters advocated by

EchoStar) in order unrealistically to shrink stations' predicted coverage areas (NPRM ¶ 32); and

- proposing phony and unscientific new methods of measuring signal intensity (advocated by EchoStar) in which antennas would be pointed the wrong way or the signal would be "split" many times before being measured (NPRM ¶ 39 n.76).

The Commission must reject these radical and illogical proposals, which would be completely inconsistent with Congress' decision -- expressly recognized in the NPRM (¶ 36) -- "to protect network-affiliate relationships and to foster localism in broadcasting." We note with concern, however, that when the NPRM was released, several Commission officials were quoted in the press as stating that the Commission planned to issue a "reprieve" to "15 to 20 percent" or more of those whose unlawful service has been ordered to be turned off by the CBS v. PrimeTime 24 Court. It is crucial to appreciate that every single one of these 15 to 20% potentially "reprieved" households is shown using standard Longley-Rice mapping procedures as likely to receive a Grade B intensity signal from its local network stations. Under the "reprieve" plan, copyright infringers such as PrimeTime 24 would be rewarded by adding this 15-20% bonus to the other viewers that the CBS Court is already allowing them to serve (absent a contrary measurement) because the viewers are predicted by standard FCC procedures to be unable to receive Grade B signals.

The FCC, of course, has no authority to grandfather ineligible subscribers or otherwise to promulgate special relief from the requirements of a statute that it does not administer. (Congress did grandfather a small number of otherwise unlawful subscribers in 1988, see 17 U.S.C. § 119(a)(5)(C), but has never done so since.) As a result, any step that the Commission might take to "reprieve" current ineligible subscribers would be applicable not just to the million or so illegally-signed-up households that are currently subject to termination, but to every American television household.

As a result, the effects of any effort to "save" ineligible subscribers from termination will be multiplied 100 fold: a "15 to 20% reprieve," if it actually had any legal effect, would rob local stations of 15 to 20 million households -- with 40 to 53 million people -- that the Commission concluded only a few months ago are served by those same stations. If this unprecedented attack on localism were actually to take place, the result would be to transfer 40 to 53 million additional customers from local stations to lawbreakers such as PrimeTime 24, in addition to the customers that PrimeTime 24 is already permitted (in the first instance) to serve because they are predicted by the Commission's standard model not to receive a signal of Grade B intensity.

The Commission has correctly recognized that "[c]hanging the standard of an acceptable signal could" -- indeed, certainly would -- "have detrimental effects on the viability of local television stations." NPRM, ¶ 27. To give the Commission an idea of the damage that the bombshell "15 to 20%" proposal would do, however, we set forth here several case studies based on real world data about real TV stations. These case studies assume that to implement the

radical 15-to-20% proposal, the Commission increased the required dBu level from Grade B to Grade A levels.[10/]

III. CASE STUDIES OF HARM TO LOCAL STATIONS FROM THE CHANGES SUGGESTED IN THE NPRM

As just discussed, a 15 to 20% across-the-board slashing of the protected service areas of local television stations would have an enormous effect on the ability of *all* network stations to serve their local communities, and in some cases even to survive. But the effects of this revolutionary change would not be limited even to the astronomical 15-20% figure specified in Commission interviews. If the Commission were to attempt to accomplish an overall 15-20% reduction in stations' protected service areas, the impact on many individual stations would far exceed 15-20%. For example, if the Commission were to purport to raise "Grade B" signal intensity to Grade A levels (e.g., raising the bar from 47 dBu for a low-VHF channel to 68 dBu) as a way to shrink stations' protected service areas, those stations that have particularly large concentrations of served population within their "Grade B donut" would suffer far more than 15-20% damage. (Maps for several illustrative stations, along with a chart summarizing county-by-county results for all of the stations discussed here and several others, are being submitted along with these comments.) For example, based on an analysis by Dataworld, a widely respected firm specializing in station coverage studies:

[10/] The NPRM suggests (incorrectly and improperly, in our view) that raising the required signal intensity to close to Grade A levels might be permissible. NPRM, ¶ 28. For simplicity, the data that follows is based on a hypothetical increase to precisely Grade A levels.

- WBKB, a CBS station in Alpena, Michigan that provides the only over-the-air programming to viewers in a rural part of that state, would see **36%** of its served local viewers offered up for legalized poaching by copyright infringers;

- KAAL, an ABC station in Austin, Minnesota, would forfeit all protection with respect to **65%** of its served local population;

- WKRG, a CBS station licensed to Mobile, Alabama but also serving Pensacola, Florida, would discover that **34%** of its served local viewers had been turned over to scofflaws;

- WSAZ, an NBC station licensed to Charleston-Huntington, West Virginia, would discover that **47%** of its served local viewers were now considered "unserved households";

- WVAH, a Fox station licensed to serve the same area in West Virginia, would be denied any protection with respect to **40%** of its served households;

- WCAX, a CBS station in Burlington, Vermont, would lose all protection with respect to **34%** of its served local viewers, including the residents of many Vermont cities and towns in its core service area;

- KTVO, an ABC station in Ottumwa, Iowa-Kirksville, Missouri, would forfeit all rights as to **71%** of the households predicted to receive its signal by the standard Longley-Rice method;

- KTVM, an NBC station in Butte, Montana, would watch PrimeTime 24, EchoSar, and DirecTV move in on **34%** of KTVM's served population;

- WLOS, an ABC station licensed to Asheville, North Carolina, would lose **45%** of the population that Longley-Rice indicates it serves today;

- KPVI, an NBC station in Idaho Falls-Pocatello-Blackfoot, Idaho, would give up any chance of protecting itself from invading distant signals with respect to **32%** of its served local viewers;

- KHQA, a CBS station licensed to Quincy, Illinois, would be forced to watch notorious copyright infringers such as PrimeTime 24 and EchoStar move in on **40%** of its served population;

- KXJB, a CBS station licensed to Fargo-Valley City, North Dakota, would lose all rights with respect to **44%** of its local served population.

For the Commission's convenience, we summarize Dataworld's analysis of the impact of this radical proposal on these and other stations in the following chart:

Impact of Use of

Grade A Intensity vs. Grade B Intensity

As Standard for Eligibility Under the SHVA*

Market	Call Letters	Network Affiliation	Population Loss	Percentage Loss
Alpena, MI	WBKB	CBS	42,508	**36.4%**
Austin, MN	KAAL	ABC	377,138	**64.8%**
Burlington, VT	WCAX	CBS	196,346	**33.8%**
Butte, MT	KTVM	NBC	40,346	**34.0%**
Butte, MT	KXLF	CBS	41,141	**34.1%**
Charleston-Huntington, WV	WSAZ	NBC	425,749	**46.7%**
Charleston-Huntington, WV	WOWK	CBS	309,846	**40.3%**
Charleston-Huntington, WV	WVAH	FOX	254,505	**40.1%**
Fargo-Valley City, ND	KXJB	CBS	173,442	**43.6%**
Greenville-Spartanburg, SC - Asheville, NC	WLOS	ABC	942,306	**44.6%**
Hannibal, MO - Quincy, IL	KHQA	CBS	134,517	**39.6%**
Idaho Falls-Pocatello-Blackfoot, ID	KPVI	NBC	91,493	**32.3%**
Little Rock, AK	KARK	NBC	349,747	**35.2%**
Mobile, AL	WKRG	CBS	438,738	**34.1%**
Ottumwa, IO - Kirksville, MO	KTVO	ABC	290,050	**70.6%**
Portland, ME	WCSH	NBC	707,515	**53.9%**
Tulsa, OK	KJRH	NBC	358,040	**29.5%**
Tulsa, OK	KOTV	CBS	346,943	**28.3%**

* Source: Longley-Rice Version 1.2.2 (F 50, 50) Analysis by Dataworld.

IV. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO TAKE MOST OF THE STEPS DESCRIBED IN THE NPRM

A. Modifying the Definition of Grade B Intensity

1. Modifying "Grade B Intensity" In General

There is no doubt that the Commission could, after conducting an extensive and exhaustive empirical and legal inquiry, take the profoundly significant step of altering the definition of Grade B intensity for the many regulatory purposes for which it uses that concept, if it concluded that a better objective proxy for acceptable picture quality was available. The Commission has, of course, conducted no such exhaustive inquiry, and making such a change would have massive ripple effects throughout the Commission's entire regulatory scheme. Even if the Commission were to raise or lower the dBu levels constituting "Grade B intensity" for other purposes, however, that change would not affect the meaning of Section 119 of the Copyright Act -- which, as discussed below, borrowed the FCC's then-existing regulatory regime to achieve a specific legislative purpose.

2. Modifying "Grade B Intensity" Solely for SHVA

a. Congress Adopted the Specific Definition of Grade B Intensity in Force In 1988, and the FCC Cannot Change the Meaning of the SHVA By Any Action Now

For the reasons set forth in our prior filings, and as explained in greater detail below, Congress did not delegate any rulemaking authority to the FCC about the definition of Grade B intensity. Rather, Congress specifically adopted the FCC's then-existing recitation of "Grade B" signal strengths -- e.g., 47 dBu as the "Grade B" minimum signal strength for Channels 2-6. Because Congress adopted a specific, existing regulation -- rather than simply making some general reference to another body of law -- any subsequent amendment by the Commission to the definition adopted by Congress would have no impact on the meaning of "Grade B intensity" as adopted by Congress. The cases cited by the Commission -- although quoted out of context by the satellite industry -- involve completely different settings, and are entirely consistent with the rule just stated.[11/]

[11/] In Lukhard v. Reed, 481 U.S. 368, 379 (1987), for example, Congress had simply used a completely undefined term -- "income" -- without indicating any specific source for defining that term, much less specifying a particular existing regulation. And Helvering v. Wilshire Oil Co., 308 U.S. 90 (1939), addresses a different argument -- the effect of re-enactment of a statute. Here, the point is that when it was first enacted, Congress carefully and explicitly incorporated a specific existing FCC regulation. As the cases discussed in our prior filings (and in the filing today by the Network Affiliated Stations Alliance) make clear, that type of incorporation by reference is not affected by subsequent changes in the incorporated provision.

b. The Commission Lacks Authority To Rewrite The Compromise Embodied In The "Grade B Intensity" Provision Of The SHVA

Even if the Grade B signal intensities specified in the Commission's 1988 rules were not permanently incorporated into the SHVA, the Commission would lack authority to alter those intensities for purely SHVA purposes. As discussed above, in enacting the SHVA, Congress intended to create an extremely narrow compulsory license that would apply, at most, to perhaps a million television households, almost all in remote rural areas, and would foster localism by zealously protecting the role of network affiliates as exclusive outlets for their networks' programs. In doing so, Congress reached out to borrow the Commission's longstanding objective proxy for acceptable picture quality, which the Commission used for many regulatory purposes.

As also shown above, the suggestion in the Notice that such intensities might be raised almost to Grade A levels (see NPRM, ¶ 28)[12/] and the quoted statements by Commission representatives at the time the Notice was released, if actually implemented, would transform the narrow statutory license into a sweeping charter for the delivery of network program services, to some **15 to 20% of all American TV households -- 15 to 20 million households, with 40 to 53 million people -- *beyond those that Congress intended to be eligible.*** For many reasons, the Commission has no authority to take any such revolutionary step.

12/ An increase from 47 to 68 dBu is a tenfold increase in signal intensity, because dBu's are measured in a logarithmic (highly compressed) scale.

i. Congress Granted the FCC No Authority to Expand the Narrow Compulsory License Congress Enacted

The Notice asks whether the Commission might have authority to "promulgate a special definition of Grade B intensity for the exclusive purposes of the SHVA" (NPRM, ¶ 22). It clearly should not do so. The FCC is a creature of the Communications Act. The SHVA, on the other hand, is emphatically part of the Copyright Act. The FCC has no special expertise in the policies of the Copyright Act or the rights of copyright owners and users under that statute; it has not been given any role in administering or enforcing the Copyright Act generally; and it has no role in administering or enforcing other aspects of the SHVA. Most crucially, the Commission has not been invited by Congress to revisit the legislature's compromise policy decision to create a strictly limited compulsory license for a small number of almost entirely rural homes.

On this score, it is critical to appreciate that **the definition of "Grade B intensity" is not some minor technical detail in the SHVA**. To the contrary: just as its DNA determines the characteristics of an organism, the signal intensities that are defined as "Grade B" control the central issue under the SHVA -- whether a copyright owner's normal exclusive rights will be respected, or whether a third party may usurp them. And like the ability to alter the genetic code of an organism, the power to change what dBu levels are called "Grade B" is the power to transform the narrow compulsory license created by Congress into something unrecognizably broad. It is unimaginable that Congress would have -- without any comment

whatsoever -- delegated to the Commission the power unilaterally to rewrite the central compromise that made enactment of the SHVA possible.[13/]

The Act's history buries any notion that Congress somehow silently authorized the FCC to turn a mouse into a monster by rejiggering the Act's genetic code. Specifically, the fact that Congress did not intend to grant the Commission any authority to alter the DNA of the Satellite Home Viewer Act is confirmed by the manner in which the "Grade B" provision was added to the Act -- and the way in which Congress did assign responsibility to the FCC when it intended to do so.

First, the phrase "over-the-air signal of grade B intensity (as defined by the Federal Communications Commission)" was written by the House Judiciary Committee, which has jurisdiction over the Copyright Act. Having run up against a political brick wall in trying to enact legislation based on a loose, subjective standard of self-reporting about picture quality, the Judiciary Committee borrowed the objective "Grade B" signal intensities promulgated by the Commission more than 30 years before, and never changed since that time -- to provide a known, objective standard for eligibility and thereby overcome broadcaster objections to the bill.[14/] Although the bill was referred sequentially to the House Energy & Commerce Committee, which does have jurisdiction over the FCC, that Committee made no changes whatsoever to, and no

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[13/] See Declaration of Michael Remington, reprinted in Copyright Office Report, Appendix II, at 497-99 (agreement on objective "Grade B intensity" standard, and protection of network/affiliate relationship, were crucial to enabling SHVA to be approved by Congress).

[14/] See Declaration of Michael J. Remington, reprinted in Copyright Office Report, Appendix II, at 488-99; cf. CBS v. PrimeTime 24, 9 F. Supp.2d at 1340.

comments whatsoever about, the "grade B intensity" language written by the Judiciary Committee. See H.R. Rep. No. 100-887, pt. 2 (1988) (Energy & Commerce Committee Report on SHVA).[15/] Nor does either Committee Report give the slightest indication that Congress intended to allow the Commission to tinker with the central genetic code of the SHVA.

Second, when Congress did intend to grant the FCC regulatory authority in the SHVA (Pub. L. 100-667, tit. II), it did so very explicitly. The Energy & Commerce Committee's report about the Act describes ***four*** such express directives:

- **"Section 712(1) Syndicated Exclusivity**

  The bill directs the Federal Communications Commission (FCC), within 120 days after the date of enactment, ***to undertake a combined inquiry and rulemaking proceeding regarding the feasibility of imposing syndicated exclusivity rules for private home viewing. . . ."***

- **"Section 712(2)**

  In the event the Commission adopts rules imposing syndicated exclusivity for private home viewing, the bill provides that violations of such rules shall be subject to the remedies, sanctions and penalties under Title V and Section 705 of the Communications Act. . . ."

- **"Section 713 Discrimination**

15/ The Committee Reports state that the term "Grade B intensity" was "defined by the FCC, currently in 47 C.F.R. section 73.683(a)." E.g., H.R. Rep. 100-887, pt. 1, at 26 (1988). As the context makes clear, Congress used the term "currently" because the location where the definition is codified might change, not to grant any new authority to the Commission.

The bill directs the FCC within a year of the enactment of this Act, to prepare and submit a report to the Senate Committee on Commerce, Science and Transportation and the House Committee on Energy and Commerce ***on whether, and the extent to which, there exists unlawful discrimination*** against distributors of secondary transmissions from satellite carriers. . . ."

- **"SECTION 4. INQUIRY ON ENCRYPTION STANDARD**

This section amends section 705 of the Communications Act to ***require the FCC, within six months after the date of enactment of this legislation, to initiate an inquiry*** concerning the need for a universal encryption standard that permits the decryption of satellite cable programming intended for private viewing by home satellite antenna users. . . ."

. . . .

"If the Commission finds, as a result of the information gathered from the Inquiry and from other information before the Commission, ***that a universal encryption standard is in the public interest, the Committee intends for the Commission to move immediately to initiate a rulemaking to establish such a standard."***[16]

These examples prove beyond doubt what would be obvious in any event: had Congress intended the Commission (which administers the Communications Act) to be empowered to expand a narrow Copyright Act compulsory license by a factor of 15 or 20, it would certainly have said so explicitly.

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[16] Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2, at 26-28 (emphasis added).

Nor is there any basis for an assertion that the Commission has discretionary authority to interpret "Grade B intensity" for SHVA purposes in some other fashion, under the doctrine of Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). First, the phrase "Grade B intensity" is not in the least ambiguous: two courts (the ABC Court in North Carolina and the CBS Court in Florida) have found it simple to construe. In any case, Chevron applies only to "an agency's construction of the statute which it administers," id. at 842; it does *not* apply to an agency's interpretation of a statute not entrusted to its administration.[17] As we have shown, the administration of the SHVA has not been entrusted to the Commission in any respect. To invoke Chevron in support of a claim that the agency *has* such responsibility and authority in this single -- and absolutely central -- respect would be absurd.

ii. The Commission Clearly Lacks the Authority to Defeat the Intent of Congress By Creating a Broadly-Available Compulsory License That Would Sabotage Localism and Undermine the Network/Affiliate Relationship

Assuming arguendo that the Commission has some limited authority to tinker with a statute administered by another agency and never entrusted to it, it could not possibly use that authority to take the radical steps advocated by the satellite industry, or to alter Grade B intensity in the manner suggested by Paragraph 28 of the NPRM. As shown above, if satellite

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[17] See, e.g., Crandon v. U.S., 494 U.S. 152, 176-8 (1990) (Scalia, J., concurring); Passamaquoddy Tribe v. Maine, 75 F.3d 784, 793 (1st Cir. 1996); Cheney R.R. Co. v. Railroad Retirement Bd., 50 F.3d 1071, 1073 (D.C. Cir. 1995); Jones v. Department of Labor, 977 F.2d 1106, 1110 (7th Cir. 1992); Johnson v. Railroad Retirement Bd., 969 F.2d 1082, 1088-89 (D.C. Cir. 1992); Department of Energy v. FLRA, 880 F.2d 1163, 1166 (10th Cir. 1989); West Point Elementary School Teachers Ass'n v. FLRA, 855 F.2d 936, 940 (2d Cir. 1988); Shanty Town Assocs. v. EPA, 843 F.2d 782, 790 n.12 (4th Cir. 1988).

carriers could take away from local stations any viewer who did not receive a Grade A intensity signal -- as the NPRM incorrectly suggests the Commission could very nearly do -- the result would be to transform the SHVA into a license utterly different than the one Congress enacted. Rather than applying to a tiny number of homes in remote rural areas, the radical new compulsory license would apply to tens of millions of additional households, many in urban and suburban areas. And far from posing no threat to local network stations, it would have a crushing effect on many stations, even handing over to satellite scofflaws a majority of the station's local viewers in some instances, as illustrated by the examples above. The Commission plainly lacks the authority to transform a narrow compulsory license enacted by Congress into a massive transfer of property rights -- in this case to scofflaws -- that Congress could not conceivably have contemplated.[18/]

Although there is no need even to reach the issue, such an astronomical expansion of the satellite compulsory license would also violate a separate and long-established doctrine:

18/ SEC v. Sloan, 436 U.S. 103, 118 (1978) (courts must reject agency actions that are "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."); Parisi v. Chater, 69 F.3d 614, 617 (1st Cir. 1995) ("No deference, though, is due an agency interpretation that is inconsistent with the language of the statute, contrary to the statute's intended effect, arbitrary, or otherwise unreasonable."); Merz v. Secretary of Health and Human Services, 969 F.2d 201, 203 (6th Cir. 1992) ("[T]his court must reject the agency's interpretation if it is inconsistent with statutory mandate or congressional policy."); Kerr-McGee Chem. Corp. v. U.S. Nuclear Regulatory Comm., 903 F.2d 1, 6 (D.C. Cir. 1990) (a court "must reject the agency's interpretation if it is 'inconsistent with the statutory mandate or [would] frustrate the policy that Congress sought to implement.'"); Wilcox v. Ives, 864 F.2d 915, 925 (1st Cir. 1988) (no deference to agency is its "interpretation is [in]consistent with the language, purpose, and legislative history of the statute."); Production Workers Union Local 707 v. NLRB, 793 F.2d 323, 328 (D.C. Cir. 1986) ("When the intent of Congress is clear . . . the court must give effect to the intent of Congress regardless of the agency's opinion.").

that because "[c]ompulsory licenses are limitations to the exclusive rights normally accorded to copyright owners," they "must be construed narrowly to comport with their specific legislative intention." Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,590 (1991) (emphasis added). As the Copyright Office has explained, "an overbroad interpretation exceeds the intent of Congress in creating the compulsory license as a response to a specific legislative policy issue." Id. (emphasis added); see Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir. 1975), cert. denied, 423 U.S. 841 (1975) (compulsory license "must be construed narrowly, lest the exception destroy, rather than prove, the rule").

iii. In this Rushed Proceeding, the Commission Could Not Possibly Alter its Consistent Policy For Nearly Five Decades, Reaffirmed Only Months Ago, that Grade B Intensity is The Proxy for Acceptable Picture Quality

As discussed in detail in the Engineering Statement of Jules Cohen, the Commission first determined nearly 50 years ago that the signal strengths set forth in 47 C.F.R. § 73.683(a) are a sound objective proxy for acceptable picture quality. The Commission revisited the issue in the 1970s -- when a Commission study suggested that it might make sense to revise the signal intensities slightly downward in most cases -- but decided to take no action.

Of greatest significance here, the key Working Party on the Advisory Committee on Advanced Television Systems, concluded that the Commission's long-standing definition of Grade B intensity continues to be appropriate. Engineering Statement of Jules Cohen, ¶ 7.

Based on that recommendation and on its own judgment, the Commission used the current Grade B intensity values as the entire foundation of the "replication" process in the DTV proceeding. Specifically, as discussed below, the Commission relied on its long-standing "Grade B" intensity values to determine which viewers can actually watch particular TV stations.

As the Commission has explained, its purpose in using Longley-Rice with the standard OET Bulletin 69 parameters and with its settled Grade B intensity values was to predict station coverage areas accurately so as to "ensure that *broadcasters have the ability to reach the audiences they now serve* and that *viewers have access to the stations that they can now receive over the air.*" Sixth Report & Order, In Re Advanced Television Stations and Their Impact Upon the Existing Television Broadcast Service, FCC 97-115, ¶ 29, 12 FCC Rcd. 14588, 14605 (1997) (emphasis added); see id. at 14630 (replication process "will preserve both *viewers' access to the existing stations in their market* and *stations' access to their existing populations of viewers*") (emphasis added). If the Commission believed that a signal of Grade B intensity created an unwatchable picture, it would have been irrational to conduct the replication process in the way it did, and the statements just quoted would have made no sense.

It would be illogical to suggest that a different definition of Grade B intensity is somehow warranted here because the SHVA concerns reception at particular households. A signal of 47 dBu (or more precisely, 41 dBu) is either likely to create an acceptable picture for Channel 4, or it is not. Having committed itself for nearly five decades to the position that it ***does***, and having built a complex regulatory system (including an enormously significant digital allocation process completed only nine months ago) on that central regulatory principle, the FCC

cannot simply abandon it because of political pressure to "do something" about terminations necessitated by satellite industry lawlessness.[12/] Any such change would need to be applied generally, and would need to be the product of a massive empirical and legal inquiry -- which the FCC and the commenting parties could not possibly carry out on the extraordinarily truncated schedule the Commission has set for this proceeding.

Notably, the satellite industry has expressly recognized this point. In its Petition, for example, EchoStar does not ask the Commission to make any change to the definition of Grade B intensity in this hectic proceeding: "EchoStar recognizes that the redefinition of Grade B intensity for SHVA or any other purposes may require careful, fully informed and elaborate analysis." EchoStar Petition at 11 (emphasis added). Even if the Commission had the power to modify the definition of Grade B intensity for SHVA purposes -- which it does not -- it therefore could not alter that definition in this proceeding.

12/ If the Commission wishes to consider *suggesting* different location and time variability percentages to Congress or the courts, it should incorporate any such changes into a *suggested* predictive model, rather than by altering the dBu figures that have defined "Grade B intensity" for decades. See NPRM ¶ 32. In that regard, we note that when using Longley-Rice in point-to-point mode, there is no need for a location variability input. Moreover, any substantial change the Commission might choose to make in the Longley-Rice algorithm it has used for years would need to be explained with a careful and reasoned engineering analysis.

B. Methods of Predicting Grade B Intensity

1. Because Satellite Carriers Can Meet Their Burden of Proof Only Through Actual Signal Intensity Measurements, No Merely Predictive Method Can Satisfy the Carrier's Burden

As the FCC itself recognizes, it will be up to the courts -- not to the Commission -- to decide whether a satellite carrier has met its statutorily imposed burden of proof. NPRM, ¶ 24; 17 U.S.C. § 119(a)(5)(D). The ABC court has already expressly held that under the SHVA, a satellite carrier can meet its burden of proof only by conducting actual site measurements. See ABC, Inc., 17 F. Supp.2d at 473-74. Indeed, the Commission itself recognizes this point in stating that "[t]he definition of an unserved household . . . most logically refers to signal measurement at an individual household" to determine if a Grade B intensity signal is present. NPRM, ¶ 29.

Accordingly, while a court might choose (with the plaintiffs' consent) to rely on a predictive method as part of an equitable remedy in a copyright infringement case -- as the CBS court in Miami has done -- no action by this Commission can change the requirements imposed by the Copyright Act on satellite litigants.

2. If the Commission Wishes to Suggest a Predictive Model, It Should Endorse Its Standard Longley-Rice Model, Which Has Been Validated Through Extensive Random Testing

To the extent the Commission wishes to recommend a predictive model for consideration by Congress or the courts, NAB supports the Commission's tentative conclusion

that it should endorse the same predictive model it relied on in the digital television allocation proceeding. NPRM ¶¶ 22-24. As Jules Cohen explains in his Engineering Statement, he has supervised actual signal intensity tests at the locations of more than 500 randomly selected satellite subscribers, and has found the Commission's standard Longley-Rice model to be an excellent predictor of measured field intensity. For example, in Charlotte, North Carolina -- a market specifically endorsed by PrimeTime 24 as a typical American television market -- Longley-Rice was 99% accurate in predicting the results of actual signal intensity tests conducted near the homes of more than 100 randomly selected subscribers. See Supplemental Expert Report of Jules Cohen, May 29, 1998, ¶¶ 14-16. Similarly, in Baltimore, Raleigh, and Miami, the accuracy of Longley-Rice in predicting actual signal intensity measurements was 94%, 99%, and 100% respectively. See id., ¶ 32.[20] By contrast, the artificially shrunken predictions advocated by EchoStar, and discussed in the next section, would result in tremendous underprediction of actual signal intensity. Cohen Eng. Statement, ¶ 39. In Charlotte, for example, 37% of the tested subscribers would be falsely predicted not to receive a signal of Grade B intensity when they were actually measured to get at least a Grade B (and often a much stronger) signal. Id.

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[20] To test an extreme "worst case," Mr. Cohen also arranged for testing of randomly selected subscribers with respect to a UHF station in Pittsburgh, a market with extremely difficult terrain. Even in this worst-case situation, the accuracy of Longley-Rice was 73%.